In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 787

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1b-7b) is not yet reported.

JURISDICTION

The order sought to be reviewed was entered by the Court of Claims on July 3, 1968 (Pet. App. 3b, n. 3). Timely extensions of the time for filing a petition for a writ of certiorari were sought and obtained to and

including November 30, 1968. The petition was filed on November 29, 1968. The jurisdiction of this Court is invoked under Section 1 of the special jurisdictional act authorizing this suit, 60 Stat. 715, and under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether land excluded from an Indian reservation by an erroneous survey and subsequently placed by presidential order in a national forest and administered as such for more than 50 years has been taken by the United States.

STATEMENT

The Flathead Reservation was created by the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975 (Pet. App. 1c). Due to erroneous surveys in 1887 and 1893, approximately 15,000 acres were excluded from the reservation. In 1897 and 1906, Presidents Cleveland and Roosevelt, respectively, placed the portions of the excluded lands at issue here, along with other lands in Montana, in national forests pursuant to 29 Stat. 907 and 30 Stat. 11, 35, 36, respectively, which authorized the creation and expansion of forest reserves.[1] The Tribes filed suit for a number of claims, including compensation for loss of lands excluded by the erroneous surveys. The Court of Claims upheld the Tribes' position as to the erroneous surveys and held they were entitled to recover sums to be determined in subsequent proceedings. 173 C.Cls. 398 (Pet. App. 1a-9a).

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[1] About 5,000 of the 15,000 excluded acres have been patented to homesteaders or railroads (Pet. 5, n. 1).

Subsequently, in this proceeding the Tribes sought to have the approximately 10,000 acres in the national forests deleted from their claims on the ground that those lands "remain the property of plaintiff" (Pet. App. 2b). The Court of Claims refused, holding that "the areas have been administered as, and have become part of, the national forests; they have been uniformly so treated by Congress and the executive branch" (Pet. App. 5b-6b).

ARGUMENT

The decision of the Court of Claims is correct and presents no conflict with decisions of this Court or any other court. Contrary to petitioners' contention, the decision here is fully consonant with *Creek Nation* v. *United States*, 295 U.S. 103. There, as here, land was erroneously omitted from a reservation. In *Creek*, some 5,000 acres were patented to settlers in the belief that the lands were not in the reservation. Here 5,000 acres have also been patented out on the assumption that the survey was correct, and the remaining 10,000 acres have been disposed of by placing them in and administering them as a national forest. Cf. *Chippewa Indians* v. *United States*, 305 U.S. 479. Petitioners concede they have lost the 5,000 acres but urge that, because the United States did not convey title to the remaining 10,000 acres to any third persons, they still belong to the Tribes. But this consideration cannot be decisive, since the United States is empowered to take lands for its own uses, and not merely for conveyance to third persons. It was the exclusion followed by other disposition that constituted

the taking in *Creek*. As the Court expressly noted in *Creek* (295 U.S. at 110), the patents could have been cancelled and title returned to the United States. There, as here, the erroneously excluded lands were, for many years, treated as if they had been correctly excluded and were put to other uses. Certainly, the appropriation of monies over the years for administration of the national forests, including those here, and the administration of them with knowledge of their actual boundaries constitute, as the Court of Claims held, confirmation and ratification of their boundaries as they appear, erroneous or not.

United States v. *Goltra*, 312 U.S. 203, on which petitioners rely (Pet. 8), is inapposite. In *Goltra*, the Court found "neither the requisite Congressional authority before the taking nor any ratification or confirmation of the tort after the taking, which would justify a conclusion that the fleet was acquired by eminent domain" (312 U.S. at 209). By contrast, the court below here found both prior authorization (Pet. App. 6b-7b) and subsequent ratification (Pet. App. 5b-6b) of the taking.

There is also no conflict with the two Court of Claims decisions relied on (Pet. 8-10). In *Yakima Tribe* v. *United States*, 158 C.Cls. 672, 698, the land had "not been disposed of or *set apart* by the Government * * *." (Emphasis added.) Here, the land has been "set apart" in a national forest. In *Seminole Nation* v. *United States*, 102 C.Cls. 565, certiorari denied, 326 U.S. 719, the Court of Claims simply held that adoption of a survey without knowing it to be erroneous was not a taking. But at the time then

relevant (1891), no disposition of the land had been made. When a disposition was made in the following year, it constituted a taking. 102 C.Cls. at 618.

We note, finally, that this is a decision of very limited application because it involves only the unusual factual situation of an ancient and erroneous survey where excluded land has subsequently been placed in a national forest or other national reserve.[2]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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[2] No question arises in this case with respect to the jurisdiction of the Court of Claims to enter the order requested by the plaintiffs, in light of the special jurisdictional statute applicable to this litigation which authorizes that court "to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims of whatsoever nature which the Confederated Salish and Kootenai Tribes of Indians of the Flathead Reservation of Montana, or any tribe or band thereof, may have against the United States." 60 Stat. 715.

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